IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 1180 OF 2004

Hirabai Dnyaneshwar Kale & ors. ... Appellants

V/s

Dnyaneshwar Vithal Shevale & ors. ... Respondents

Shri Uday Warunjikar for the appellants.

Shri G.S. Godbole for Respondents.

CORAM: P.V. KAKADE, J.

DATED: 8TH DEC., 2004.

P.C.:

1. The appellant has filed this appeal against the judgment and order passed by the Addl. District Judge, Pune, dated 31.12.2003 partly allowing the appeal and setting aside the order passed by the Civil Judge, J.D., Ghodegaon dated 17.10.2000, whereby the suit was partly decreed and it was declared that the adoption deed dated 25.9.1981 executed by one Vitthal Shevale in favour of the defendant No.1 was illegal and incapable to create any right in favour of the defendant No.1.

2. I have heard the learned counsel for both parties.

Perused the record.

3. One Laxman Shevale was the original ancestor of the family of plaintiff and defendants. Laxman had five sons. Out of them, except Shankar, rest of the sons of Laxman are dead. Shankar is defendant No.12 in the suit. Plaintiff Sonabai is the widow of Vitthal and plaintiff Nos. 2 to 4 are daughters of plaintiff No.1 Sonabai. Defendant No.2 is the son of Bhau and defendant Nos. 3, 4 and 5 are daughters of Bhau. Ganpat expired in the year 1983. Defendant No.6 is the son and defendant Nos. 7 to 9 are daughters of Ganpat. Defendant No.10 is the wife of Ananta and defendant No.11 claims to be the son of Ananta, however, he is the son of Shankar. Defendant No.1 claims to be the adopted son of Vitthal. It is further averred by the plaintiff that the entire properties mentioned in para 1 of the plaint were joint family properties of all five brothers. Some of the properties were ancestral properties in the hands of these brothers and some of the property was pruchased out of joint family income. The entire suit properties are the joint properties of plaintiff and defendant Nos. 1 to 12. Deceased Bhau Laxman Shevale was the Manager and Karta of the entire joint family property. Bhau expired in the year 1971.

Thereafter, by way of family arrangement, each land was divided into five portions and the heirs of all the five brothers started cultivating their share separately. However, there is no partition effected between these five brothers by actual metes and bounds. It is the plaintiff's case that all the defendants are disturbing their possession over the land allotted to their share and they are trying to dispossess the plaintiffs from the suit land. Plaintiffs, therefore, demanded partition and separate possession of their 1/5 share in the entire suit lands from the defendants. However the defendants refused to effect the partition and they have refused to allot separate share to the plaintiffs.

4. It was the case of the plaintiffs that, defendant No.1 Dnyaneshwar is the son of defendant No.12 Shankar. However, he claims to be the adopted son of Vitthal who is the husband of plaintiff No.1 and father of plaintiffs 2 to 4. According to the plaintiffs, the defendants have fraudulently brought into existence the adoption deed dated 25.9.1981. According to the plaintiffs, deceased Vitthal had no authority to adopt defendant No.1 Dnyaneshwar and he also cannot be given in adoption. As such, the adoption deed dated 25.9.1981 is a legal and void document which cannot be acted upon.

The defendant No.1 has tried to get his name recorded to the 7/12 extracts of the suit land standing in the name of deceased Vitthal and thereby he is trying to disturb peaceful possession of plaintiffs' over the suit land.

5. Defendants 2 to 6 filed their joint written statement at Exh.33. They have admitted the entire suit claim. The contesting defendant No.1 resisted the suit submitting that the adoption deed dated 25.9.1981 was legal and valid document and, therefore, plaintiffs' claim that it was a sham and bogus document was challenged. So far as the issue of adoption is concerned, defendant No.1's case is to the effect that deceased Vitthal Shevale had only three daughters and he had no son. He, therefore, decided to adopt a child. Accordingly on 7.5.1981 deceased Vitthal adopted defendant No.1 from his natural parents. The giving and taking ceremony and all the religious ceremonies incidental thereto were performed on 7.5.1981. Thereafter on 25.9.1981, a registered deed of adoption was prepared and it was signed by Vitthal and his wife Sonabai and, therefore, it was valid adoption.

On these and other contentions, the suit was sought to be dismissed with costs.

6. The learned Trial Judge settled the issues and adjudicated the suit holding that plaintiffs had proved that the adoption deed dated 25.9.1981 was illegal and incapable to create any right in favour of defendant No.1 and, as such, defendant No.1's case that he was having undivided share in the suit property being adopted son of the deceased Vitthal Laxman Shavale, came to be rejected and the suit was partly decreed.

7. The appeal was carried to the District Court, Pune. The learned Addl. District Judge held on the basis of available evidence that it was legal and valid document and, therefore, allowed the appeal partly upholding defendant No.1's right as a adopted son of deceased Vitthal. Hence the present appeal.

8. At the outset, it may be noted that the only dispute sought to be raised at this stage is regarding the question of legality of deed of adoption and status of defendant No.1 as a adopted son. The learned counsel for the appellants brought to my notice various pieces of evidence sought to rely upon including Sections 10 and 11 of the Hindu Adoptions & Maintenance Act, 1956, whereunder the person who is given in adoption cannot be

a married person unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption. However, adoption of son under the said provision is not permitted if the son is over the age of 15 years, unless there is custom or usage applicable to the parties which would permit contrary in the said provision. On the basis of this provision, it was urged that defendant No.1, at the time of adoption, was admittedly 31 years of age and was married having wife and two daughters and, therefore, in absence of any evidence to show the custom or usage to the contrary, the adoption was illegal. This was said to be the substantial question of law involved in this appeal.

However, the learned counsel Shri Godbole for the respondents brought to my notice the judgment of the Full Bench of this Court in the case of **Anirudh Jagdeorao v/s Babarao Irbaji & ors., reported in 1983 Mh.L.J. Page 379,** which has settled the dispute once for all. It is laid down by the Full Bench that, it is settled legal position that the parties in question and present parties involved in this appeal, are governed by the Maharashtra or Bombay School which is division of Mitakshara School. Mitakshara having sub-divided into

four schools, namely, (1) Banaras School, (2) Mithila School; (3) Maharashtra or Bombay School; and (4) Dravida or Madras School. So far as Bombay School is concerned, it is the fact that in the Presidency of Bombay, the dominating commentary is the Mayukha which is a supplementary commentary to the Mitakshara. Therefore, there is absolutely no doubt that the present parties are governed by Mayukha or Mitakshara of Hindu Law. Once it is settled, the practice of taking married person and boys over 15 years of age in adoption in the region which are governed by the Bombay School of Hindu law, has been constantly recognized by the Bombay High Court. Relying on Supreme Court ruling reported in **A.I.R. 1962 SC 1493,** the Full Bench has further observed that, it is well settled that where a custom is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom introduced into the law without the necessity of proof in each individual case. Therefore, it is now well settled legal position that in Bombay School of Hindu law which was governing the present parties, adoption of married persons and boys over 15 years is established custom and, therefore, there was no need of any further proof in that regard.

9. Moreover, it is an admitted position that the adoption deed involved in this appeal is a registered document and, therefore, presumption under Sec. 16 of the Hindu Adoption and Maintenance Act would prevail as the form of registration is neither rebutted nor denied on behalf of the present appellants.

10. The learned counsel for the respondents also brought to my notice that, by virtue of Art. 57 of the Limitation Act, the suit would also be barred because the deed of adoption is of 25.9.1981, whereas the suit is filed on 18.6.1990 and, therefore, Art. 57 is required to be invoked which oppose the suit in toto. No doubt, the specific question of limitation was not raised in the Trial Court, however, being the pure question of law, I have preferred to refer to that aspect also.

11. In view of this position, it is clear that the appeal is not maintainable. The question regarding legality and validity of adoption was definitely a question of law, but certainly cannot be said to be the question of law, because the issue sought to be raised is squarely settled by the Full Bench of this Court and, therefore, I have no hesitation to hold that the appeal

deserves to be dismissed.

In the result, the appeal stands dismissed in limine with no order as to costs. Consequently, the civil application also stands dismissed with no order as to costs.

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